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IN THE FOURTH JUDICIAL DISTRICT COURT, WASATCH COUNTY

STATE OF UTAH

UTAH STREAM ACCESS COALITION, a Utah non-profit corporation, Plaintiff, vs. ATC REALTY SIXTEEN, INC., a California corporation, et al. Defendants.	**ATC REALTY SIXTEEN, INC.'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF UTAH STREAM ACCESS COALITION'S MOTION FOR SUMMARY JUDGMENT** Civil No. 100500558 Hon. Derek Pullan

ATC Realty Sixteen, Inc., by and through counsel, hereby submits the following supplemental memorandum as requested by the Court and in support of its cross-motion for summary judgment and in opposition to Plaintiff Utah Stream Access Coalition's motion for summary judgment.

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I. ISSUE

No state public trust doctrine is implicated absent a transfer, abandonment or abrogation of the public's interest in its public property. Indeed, a state public trust doctrine will tolerate a transfer of public property unless it is so severe such that the public loses its interest in the property that remains. This Court has recognized that H.B. 141 did not transfer, abandon or abrogate any public property. The issue, then, is whether H.B. 141 violates the state public trust doctrine. Respectfully, Defendant ATC Realty Sixteen, Inc. ("ATC") submits it does not.

II. STATUS OF THE CASE

In this action, the Utah Stream Access Coalition ("USAC") has generally challenged the constitutionality of H.B. 141 regulating the use of waters of the State. Much of this dispute has been resolved. In particular, this Court's May 21, 2012 Ruling and Order ("Ruling and Order") contains, among others, the following conclusions:

- "Article XVII, Section 1 of the Utah Constitution recognized and confirmed public ownership of natural waters and the public easement derived from that ownership." (Ruling and Order at 13).

- "The public has an easement to use [ ] public waters that includes a right to engage in all recreational activities that use the waters. The public easement recognized in *J.J.N.P.* and *Conatser* is a corollary right of use derived from public ownership of waters and was therefore recognized and confirmed by Article XVII, Section 1 of the Utah Constitution." (*Id*. at 20).

- "The Legislature has authority to regulate use of waters owned by the public and use of the easement derived from public ownership." (*Id*.).

- "H.B. 141 did not transfer to private property owners any of the 'sticks' representing the public's easement as defined in *J.J.N.P.* and *Conatser*. . . . The public's easement in its full scope as defined in *J.J.N.P.* and *Conatser* has not been transferred to private parties, abrogated or abandoned and remains in public ownership today." (*Id*. at 31).

- "The public's easement constitutes 'public lands of the State; and shall be held in

> trust for the people'" under Article XX, Section 1. (*Id*. at 35). However, "H.B. 141 did not dispose of all or part of the public's easement in waters of the State. Rather it regulated the lawful use of those waters." (*Id*.). "Because H.B. 141 did not dispose of the public's interest in land, Article XX, Section 1 has no application . . . ." (*Id*. at 36). "For the same reason, the public trust doctrine as defined in *Illinois Central R.R. Co.* is inapplicable." (*Id*.).

Plainly, the Court granted in part and denied in part all of the parties' respective motions and then requested further briefing on one issue – the state public trust doctrine. The Court specifically requested briefing focused on the doctrine's purpose, the degree of deference to be afforded to the legislature, the doctrine's distinguishing factors, and the burden of proof. The Court asks whether H.B. 141 violates the doctrine. It does not.

Public trust principles do not exist in isolation. Yet, to the extent any state public trust doctrine exists separate and apart from the trust principles set forth in Article XX, section 1 of the Utah Constitution, it is not well defined. The Court's May 21, 2012 Ruling and Order provides a framework in which public trust principles can both be developed and applied. Accordingly, insofar as this Court now seeks to substantiate this doctrine, Article XX and the Federal Public Trust Doctrine, as well as various other legal analogies, inform the doctrine's purpose, application, and scope.

III. INTRODUCTION

The purpose of any public trust doctrine, whether federal, constitutional, or based in state law, is to assure that public property remains public and that it is not disposed of. The purpose is not to define what particular uses are required, but to assure that the property remains available for public use subject to regulation determined appropriate by any given legislature in the future. It is the legislature's duty as the designated representative of the public to manage public assets in the manner it deems proper, not to try to satisfy every interest group with a particular desired use. In this capacity as trustee of public resources, the legislature is entitled to significant

deference and the burden is on any party challenging the legislature's action to prove that the legislature has acted in violation of trust principles.

The state public trust doctrine as described by USAC cannot be sustained by this State's or any civilized state's judicial system. USAC paints a picture of a public trust doctrine which exists to protect recreators above all else and which would make litigation appropriate at every limitation on the public's pursuit of water-related fun. USAC's version of the state public trust doctrine is untenable in a well-established society where a centralized government seeks to regulate public property for the benefit of the greater good while at the same time striking a balance with private rights. No public trust doctrine requires the legislature to abstain from all regulation pertaining to the public property interest in water.

H.B. 141 does not violate public trust principles. H.B. 141 does not dispose of or transfer any public property. The public retains both a present and a future right to use of the waters of the State. H.B. 141 does not deprive the public of the ownership of the waters or even an easement associated therewith. It does not deprive the public of the right to use or otherwise benefit from the waters of the State. A different legislature is free to engage in a separate and different assessment of how to regulate the public asset. But until that happens, H.B. 141 remains intact as a valid exercise of legislative authority.

IV. ARGUMENT

A. The Purpose of Any Public Trust Doctrine Is to Assure that Public Property Is Held for the Benefit of the Public.

USAC attempts to define the purpose of any public trust doctrine to require the legislature to either abstain from any and all regulation of a public resource or, in the alternative to regulate to assure that *all* public uses are retained. Neither of these possibilities is practical or even possible. Each requires a court or a legislature to define a priority of public interests and

preferences and to make static those purposes. USAC's position does not allow for a change in priorities, a change in industry, or, even, a change in climate. The purpose of any public trust doctrine is much simpler and much broader.

Generally, a "public trust doctrine vests states with the duty to hold public resources in trust for the people of the state." Julia K. Bramley, *Supreme Foresight: Judicial Takings, Regulatory Takings, and the Public Trust*, 28 B.C. Envtl. Aff. L. Rev. 445, 456 (citing America's Changing Coasts: Private Rights and Public Trust 184–85 (Diana M. Whitelaw & Gerald R. Visgilio eds., 2005)). Key to this principle is the word "hold." The doctrine does not mandate that any property be used for any particular purpose or that any use be preserved.[1] Rather, the mandate is to ensure that the property remains available to be used for the benefit of the public in a manner determined to be of import by the legislature in light of any particular circumstances. This interpretation finds support in both state law and the Federal Public Trust Doctrine.

1. State Law

The public ownership of water "is founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all the people; and the State must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole." *J.J.N.P. Co v. Utah*, 655 P.2d 1133, 1136 (Utah 1982). In other words, "[t]he State regulates the use of the *water*, in effect, as trustee for the benefit of the people." *Id*. (citing *Tanner v. Bacon*, 136 P.2d 957, 966–67 (Utah 1943); *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961)) (emphasis added). But "[c]ertainly the phrase 'public trust' does not contain any magic such that special obligations can be said to arise merely from

[1] Moreover, "the legislation which may be needed one day … may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 460 (1892).

its incantation . . . ." Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 485 (1969–1970).

It is faulty reasoning to "treat[ ] a state exactly the same as a private trustee." *Nat'l Parks & Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 923 (Utah 1993) (Durham, J. concurring). That is, the purpose of the trust is not to carry out the particular wishes and desires of any one beneficiary, but to assure that the trust *res* is retained and managed for the benefit of all of the beneficiaries. In this respect, it is recognized that:

> A state has powers and duties far beyond those of an ordinary citizen. It has both the power to make almost any law or regulation, limited only by the state and federal constitutions, and the responsibility to legislate in the interests of its citizens. A state can never have 'undivided loyalty' to a single interest group; it must consider the health, safety, and welfare of all its people. It also has the duty to manage and preserve public lands for the benefit of present and future generations. . . . While the state's duties to the [trust beneficiaries] are important, they cannot and do not override every other obligation.

Id. (emphasis added).

Considering the nature of the resource and the breadth of potential public interest, the purpose of any public trust doctrine must be defined so as to retain or "preserve" the property for the benefit of the public – ***all*** of the public. The purpose does not reside in any particular use, any particular benefit, or any particular interest group. To find otherwise would be to declare that one particular use has an inherently higher purpose than another competing use thereby aggravating some segment of the intended beneficiaries. The doctrine does not and cannot go so far as to define the particular uses to which any resource must be put. To do so would be to ignore the potential for a change in climate, in the dominant industry, or in cultural habits and to run the risk that the defined use becomes one that is more of a hindrance than a benefit.[2] Rather,

[2] Particular uses of water may rise and fall in importance over time. At some points, use of water for mining may predominate for the public good, at other times it may be irrigation and at others fishing. In the event of a drought,

the regulation of the resource is conferred upon the legislature – the elected body charged with acting in the public interest subject to the bounds of the Constitution and the will of the people.[3]

This simple trust purpose of holding the property for the benefit of the public is evident through the recognized ability of the State to regulate the resource according to its determination of what use most benefits the public. Article XX, section 1 of the Utah Constitution provides for such State regulation stating that public lands "Shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired." Likewise, Article XVII, section 1 provides that "[a]ll existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed." The specific purposes for these constitutionally protected public lands and water have always been left to interpretation and regulation by legislation. *See, e.g.* The Compiled Laws of Utah, Vol.1, Desert Lands § 426 (1888) (the "water supply upon the public lands . . . shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights"); 1903 Laws of Utah, Ch. 100, Sec. 1, *et seq.*[4]

In essence, the State must hold the water itself in trust for the benefit of the people, but it is the legislature which identifies the beneficial purpose for which it may be used and which regulates that use subject only to the constraints of the Constitution. Utah Code Ann. §§73-1-1(3); 73-3a-101; 73-22-2. And, the legislature has long exercised its authority to dispose of this public resource and to permit its appropriation for a beneficial use – even to the extent such

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some uses may need to be abrogated to assure adequate water for irrigation or human consumption. Defining the doctrine according to use would restrict the ability of the legislature to allocate the publicly-held resource for the benefit of the public depending on the actual needs of the public at any particular point in time.

[3] Presumably, if the legislature acts contrary to the will of the people or contrary to a general consensus of what constitutes the highest and best use of any resource at any point in time, that legislature will not be re-elected.

[4] *See also* Utah Dep't Nat'l Res., http://naturalresources.utah.gov/ divisions/water-rights.html ("The office of the State Engineer was created in 1897.").

appropriation interferes with another member of the public's use.

This is borne out by the Utah system of water appropriation. The State Engineer, appointed by the Governor with the consent of the Senate, has broad powers to oversee water policy in the state. *See* Utah Code Ann. § 73-2-1. Specifically, the State Engineer shall have the power to "secure the equitable apportionment and distribution of the water according to the respective rights of appropriators." *Id.* at § 73-2-1(3)(b)(ii). In making his evaluation, the State Engineer looks to whether the sought appropriation would "'interfere with the more beneficial" use of the water, or "would prove detrimental to the public welfare.'" *Tanner,* 136 P.2d at 963. The State Engineer may permit appropriation of the public's waters for private uses regardless of whether the streams are navigable or non-navigable. Because the State Engineer may allocate public waters for private uses under the Federal Public Trust Doctrine, so too can the State Engineer allocate public waters for private uses under any state public trust doctrine if such appropriation meets defined criteria. *See, e.g., id.* at 966–67.

2. Federal Public Trust Doctrine.

The Federal Public Trust doctrine also informs the purpose of any state public trust doctrine. "The first point that must be clearly understood [about the Federal Public Trust doctrine] is that there is no general prohibition against the disposition of trust properties, even on a large scale. A state may [] recognize private ownership in tidelands and submerged lands below the high water mark …." Sax, 68 Mich. L. Rev. at 486. "[C]ourts have permitted the transfer of some element of the public trust into private ownership and control, even though that transfer may exclude or impair certain public uses." *Id.* at 488. Indeed, "private entrepreneurs [have been] permitted to enhance their own rights by excluding the public from a part of the trust property which was formerly open to all." *Id.* While "no grant may be made to a private party … of such amplitude that the state will effectively have given up its authority to govern, [] a

grant is not illegal solely because it diminishes in some degree the quantum of traditional public uses." Sax, 68 Mich. L. Rev. at 488–89.

As announced in *Illinois Central R.R. Co. v Illinois*, 146 U.S. 387 (1892) and repeated in *Colman v. Utah State Land Bd.*, 795 P.2d 622, 635 (Utah 1990), "[t]he trust with which [public lands and waters] are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or *when parcels can be disposed of without detriment to the public interest in the lands and waters remaining*." (emphasis in *Colman*). By way of example, permitting a private individual to operate an underwater brine canal in publicly owned waters did not appear to offend the Federal Public Trust Doctrine. *Colman*, 795 P.2d at 635–36. The key is that the property is *held* by the State for the benefit of the State, not to assure that all can use it in any way they desire.

3. Public trust principles apply only to public property.

In any trust, the purpose and limitations on a trustee's authority are defined with respect to the trust *res.* It follows, then, that any state public trust doctrine encompasses all public property – public lands and public waters – and significantly, encompasses *only* public property. The distinction between public and private property is apparent in the Utah Constitution and Utah statute applying those principles to the regulation of waters and lands.

Utah Code Ann. § 65A-1-1(4) defines public trust assets as: "those lands and resources, including sovereign lands, administered by the division." "'Sovereign lands' means those lands lying below the ordinary high water mark of navigable bodies of water at the date of statehood and owned by the state by virtue of its sovereignty. *Id*. at 65A-1-1(5). And Utah Code Ann. § 65A-10-1(2) makes clear that there is no "state ownership of the beds of nonnavigable lakes,

bays, rivers, or streams." [5] In this respect, the reach of the trust covers waters, including the easement for use thereof as defined by the Court, but does not extend to management or regulation of the clearly-established privately-owned streambeds. The legislature is not charged with preserving the streambeds for public use as those beds are not part of the trust *res*.

In sum, the purpose of the public trust doctrine can be no broader than to assure that the public is not deprived of a purely public asset to which it is entitled. The purpose is not to preserve any particular use at the expense of private property. To find otherwise would be to dictate that any particular use is inherently a higher and better use than all others and that the public interest in lands predominates over the constitutional protected private property interest. It would be to say that recreation trumps irrigation or vice versa and that the hierarchy of uses cannot change. The purpose must be broadly defined and the legislature must be allowed to determine, as elected officials, what regulation or disposition best serves the public interest at large. A different legislature may strike a different balance. Until that happens, the State may limit the public's use of waters so long as the public retains interest in what remains.

B. Substantial Deference Must be Paid to the Legislature in Regulation of Public Resources and a Party Challenging Legislation Bears the Burden.

The State, acting through the Legislature, is afforded great deference in managing the

[5] Of note, the cases USAC quotes in support of its advocated purpose of the public trust doctrine include *J.J.N.P.*, 655 P.2d 1133, *Deseret Live Stock Co. v. Sharp*, 259 P.2d 607 (Utah 1953), and *Adams v. Portage Irrigation*, 72 P.2d 648 (Utah 1937). These cases dealt only with the adjudication of public waters, not private property.

In *J.J.N.P.* the plaintiff landowner sought a private fish installation on the publicly owned waters situated on plaintiff's private property. *J.J.N.P.* 655 P.2d at 1135. In *Deseret*, plaintiff landowner brought an action for trespass when sheep owners drove their sheep along a trail across plaintiff's realty and used a spring adjacent to trail for watering sheep. *Deseret*, 259 P.2d at 607. There was a public road 100 feet wide across plaintiff's property that led to the spring used by defendant sheep owners. *Id.* at 609. In *Adams*, the dispute concerned prior appropriation of public waters. The plaintiffs, a group of sheep owners, brought suit against the defendant irrigation company, to establish their right to use certain springs flowing through the ranchers' property. *Adams*, 72 P.2d at 650. In all cases, the question pertained to private use of public property, ***not*** public use of private property; that is, the issue was the disposition of the public asset for private purposes, not the rights of the public in well-established private property rights.

public waters. As a body of elected representatives, the legislature is, in effect, the people. By extension, the legislature is presumed to be acting in the best interest of the people, "with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power." *Atchison, T. & S.F.R. Co. v. Matthews*, 174 U.S. 96, 104 (1899). Stated differently, "[t]here is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds." *Ward & Gow v. Krinsky*, 259 U.S. 503, 521 (1922). "[I]t is conclusively presumed a legislature acts only in the 'public interest'...." *Utah Light & Traction Co. v. Pub. Serv. Comm'n*, 118 P.2d 683, 696 (Utah 1941).

Similarly, "'statutes are presumed to be constitutional until the contrary is clearly shown. It is only when statutes manifestly infringe upon some constitutional provision that they can be declared void. Every reasonable presumption must be indulged in and every reasonable doubt resolved in favor of constitutionality.'" *Jones v. Utah Board of Pardons & Parole*, 2004 UT 53, ¶ 10, 94 P.3d 283 (quoting *Salt Lake City v. Ohms*, 881 P.2d 844, 847 (Utah 1994) (quotation omitted)). The party challenging the constitutionality of a statute always bears the burden. Only when the challenging party has demonstrated there is no "reasonable basis upon which the statute can be found to come within the constitutional framework" has the party met his burden. *Ohms*, 881 P.2d at 847 (quotation omitted). And only then does the burden shift to the State. *See id*.

The duties of the Legislature in managing the waters for the public are akin to the duties of a board of directors in managing the corporation for the benefit of their shareholders. More eloquently stated, the "statutory scheme governing the appropriation of public waters [is akin to] the principles of corporate law bearing on the function and power of boards of directors to manage corporate affairs in the interest of shareholders as a whole, and the dictates of sound

public policy." *In re Uintah Basin*, 2006 UT 19, ¶ 36, 133 P.3d 410 (quotation omitted).[6]

Under the business judgment rule, there is a presumption that "directors acted in good faith and in accordance with sound business principles." *C&Y Corp. v. Gen'l Biometrics, Inc.*, 896 P.2d 47, 55 (Utah 1996) (quoting *Resolution Trust Corp. v Hess*, 820 F. Supp. 1359, 1366–67 (D. Utah 1993)). "It is the function and the prerogative of the Board of Directors of the corporation to manage its affairs in the best interests of the corporation and its stockholders. Its action in so doing will not be interfered with so long as it is within the framework of the purposes and powers included in the corporate charter, and the action is not fraudulent or so discriminatory so to be confiscatory of the rights of the defendant …." *Summit Range & Livestock Co. v. Rees*, 265 P.2d 381, 382 (Utah 1953) (citing 13 Fletcher Cyclopedia Corp. (Perm. Ed.) § 5813). It is the burden of an aggrieved shareholder to demonstrate that a board of directors acted contrary to the business judgment rule. *C&Y Corp.*, 896 P.2d at 55.

Similarly instructive, the legislature and the legislative bodies of municipalities are afforded great deference when limiting landowners' property under the label of "zoning." "[I]f a [] [zoning] ordinance "could promote the general welfare; or even if it is reasonably debatable that it is in the interest of the general welfare" we will uphold it." *Marshall v. Salt Lake City*, 141 P.2d 704, 709 (Utah 1943); *see also Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("If the validity ... be fairly debatable, the legislative judgment must be allowed to control."). "The selection of one method of solving the problem in preference to another is entirely within the discretion of the [city]; and does not, in and of itself evidence an abuse of discretion." *Phi Kappa Iota Fraternity v. Salt Lake City*, 212 P.2d 177, 179 (Utah 1949). In sum,

[6] *See also In re Water Use Permit Applications*, 9 P.3d 409, 466 (Haw. 2000) ("[w]e decline to substitute our judgment for the Commission [on Water Resource Management]'s concerning its ultimate ruling that there was insufficient evidence to support a more conclusive assessment of instream flow requirements"); *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1092 (Idaho 1983) (the court would not "supplant its judgment for that of the legislature or agency" but would take a "close look").

a court will "not substitute [its] judgment on zoning policy for that of the city's legislative body." *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 253 (Utah Ct. App. 1998) (quotations omitted). Because of this "deferential disposition … the burden is on the plaintiff challenging a municipal land use decision to show that the municipal action was clearly beyond the city's power." *Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 12, 70 P.3d 47 (citations omitted).

Whether it is a legislative body or a board of directors, the delegation of decision making to a trusted authority is common. And the law presumes that these representative bodies act in the interest of their constituents and places the burden on an aggrieved constituent to challenge the actions of these duly elected officials. To find otherwise would be to paralyze a legislative body. In every instance and upon every act, no matter how minor or insignificant or clearly for the benefit of the constituents, the legislative body would be required to defend itself through significant proceedings and efforts which distract from their appointed tasks.

C. The Court Must Consider Whether The Public Property Has Been Disposed and Whether a Public Interest Has Been Retained.

As set forth above, state law and the Federal Public Trust Doctrine assist in defining the purpose of any state public trust doctrine to require that public property be held for the public and managed for the benefit of the public as a whole subject to legislative discretion. With this purpose in mind, state law, the Federal Public Trust Doctrine and legal analogies are again instructive in establishing the test to determine whether public trust principles have been upheld.

1. State Law

Article XX of the Utah Constitution provides:

> All lands of the State that have been, or may hereafter be granted to the State by Congress, and all land acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and, except as provided in Section 2 of this Article, are declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as may be

> provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired.

The Court has already determined that waters of the state are public property. And this Court has recognized that Article XX's trust principles are not implicated unless public lands, or here, waters, are transferred or disposed of. (Ruling and Order at 35). This limitation, however, does not prohibit regulation. And it does not even prohibit some limited disposition of public property so long as the disposition is "as provided by law." As described by the Utah Supreme Court in *National Parks*, "[t]o encompass the variety of purposes for which the federal government conveyed lands to the state, Article XX, section 1 of the Constitution had to be framed in broad terms." 869 P.2d at 920. Thus, Article XX can "be read to grant the state flexibility to use [trust] lands in a broad public trust fashion, including nonrevenue uses, so long as the lands are disposed of 'as may be provided by law.'" Wayne McCormack, *Land Use Planning and Management of State School Lands*, 1982 Utah L. Rev. 525, 532. Any violation of Article XX requires transfer or disposition of the trust property. Mere regulation does not rise to this level.

2. Federal Public Trust Doctrine

Similar principles are applied with respect to the Federal Public Trust Doctrine. "The essence of [the Public Trust Doctrine] is that navigable waters should not be given without restriction to private parties and should be *preserved* for the general public for uses such as commerce, navigation and fishing." *Colman*, 795 P.2d at 635 (emphasis added). "The Supreme Court made clear that a state can grant certain rights in navigable waters if those rights can be disposed of without affecting the public interest in what remains." *Id*. at 635–36. And "States have the authority ... to recognize private rights in [public trust] lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988). The public trust doctrine does not mandate that public property be used for any particular public purpose, simply that it be

preserved to allow for such use. It is only when property is transferred or substantially disposed of and public use substantially foreclosed that the Federal Public Trust principles are violated. *See Illinois Central*, 146 U.S. at 453, 456 ("[While] [t]he sovereign power itself [ ] cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right", parcels can be disposed of so long as there is no "substantial impairment of the public interest in ... waters remaining.").

As one Wisconsin court observed, "no single public interest in the use of navigable waters, though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis. The principle has been reasserted in many decisions of the Supreme Court." *State v. Vill. of Lake Delton*, 286 N.W.2d 622, 632 (Wis. Ct. App. 1979) (citing to various authorities for the proposition that limiting regulation was not violative in all instances of the public trust doctrine). To summarize, under the Federal Public Trust Doctrine, even when the public trust *res* is being disposed of, this does not violate the doctrine so long as the public retains an interest in that which remains.

3. Regulatory Taking

In the public trust context, the public owns the property at issue and the allegation is a deprivation of a public property right through legislative action. In essence, the claim is one of a taking. And in this respect, the law of regulatory takings as applied to private property owners is both instructive and in accord with Article XX and the Federal Public Trust Doctrine.

To prove a regulatory taking, a landowner "must show that he has been deprived of all reasonable or economically viable uses of his land" through zoning or other regulation. *Tolman v. Logan City*, 2007 UT App 260, ¶ 11, 167 P.3d 489 (quotations omitted). A regulation which

limits use of property alone or results in a "mere diminution in property value" is not enough. *Id*. Rather, the regulation must be "'so onerous that its effect is tantamount to a direct appropriation or ouster.'" *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 33 128 P.3d 1161 (quoting *Lingle v. Chevron, U.S.A. Inc.*, 544 U.S. 528, 537 (2005)).

The primary purpose of Article XX, the Federal Public Trust Doctrine, and regulatory takings law is to assure that property owners retain their property rights. The purpose is not to assure that the public can exercise all of their rights all of the time on all of their property. All that is required is that some right of use be retained and the property preserved. Thus, in consideration of past application of similar law and in fulfillment of public trust principles, the factors to consider in determining whether there is a violation of the public trust are: (1) has the State disposed of or transferred the public property to a private party; and (2) has the public retained a right to use of the public property. If the property has not been transferred and the public has retained a right of use, even a diminished right, then there is no violation. The Legislature did not violate public trust principles with the enactment of H.B. 141.

D. <u>H.B. 141 Does Not Offend any State Public Trust Doctrine.</u>

H.B. 141 does not transfer any property. The provisions at issue restrict the ability of the public to touch the land underlying streams which flow across private property. The law allows the public to float on the water and engage in any activity while floating and to touch privately-owned streambeds when incidental to floating. This is the substance of USAC's complaint. That is, USAC claims that the Legislature violated public trust principles in defining the manner in which the public may use the waters of the State. H.B. 141, however, was a valid exercise of the Legislature's power and did not constitute a violation of any state public trust doctrine.

The public property at issue has not been disposed of or transferred. H.B. 141 did not transfer any public resource to private owners. The Legislature did not grant in any private party

the exclusive right to utilize the waters in any way. As the Court previously recognized, "H.B. 141 did not transfer to private property owners any of the 'sticks' representing the public's easement…." (Ruling and Order at 31). "The public's easement … has not been transferred to private parties, abrogated or abandoned and remains in public ownership today." (*Id.*).

Instead, H.B. 141 "regulates the extent to which the public will use its easement in non-navigable waters." (*Id.*). In other words, H.B. 141 merely clarifies the public's right to use Utah's waters by limiting public access to the privately-owned streambeds beneath those waters. As the trustee of a public asset, it is the Legislature's duty to regulate that asset for the public benefit. But there is no mandate inherent in any public trust doctrine dictating *how* the legislature must regulate the asset. In regulating the public trust asset, the Legislature did not act contrary to its authority or any established public right. Regulation of water rights is not only permissible in Utah, it is a result of public ownership itself. "Indeed, the doctrine of public ownership is the basis for the legislature's regulatory authority." (*Id.* at 21).

Further, to the extent a publicly-owned easement for use of the waters has been narrowed in some respect, the Legislature has retained the capacity to expand it in the future should public benefit so demand. And, through this retention, the public maintains the right to use the easement more broadly in the future should a different legislature determine expansion is appropriate. This future potential right, however, is not the only right to use that the public retains.

Despite USAC's complaints, the public continues to possess an interest in the waters themselves. The public may, among other things, float down their public waters, fish in their public waters, and appropriate their public waters for private uses such as irrigation upon application to the State Engineer. The public's use of its public resource has not been effectively destroyed. Plenty of beneficial uses remain. In fact, the Legislature solidified one use by specifically providing a method by which the public can obtain prescriptive rights to use of

privately-owned streambeds. Utah Code Ann. §§ 73-29-203. The public still retains the right to obtain the easement it desires. While USAC contends there is a diminution in the public's ability to use the public waters, a mere diminution is not enough to constitute a violation of any state public trust doctrine.

"From territorial days … and continuing to the present day, the Legislature has extensively regulated the use of public waters. Today an entire volume of the Utah Code is devoted to the legislative regulation and management of water and irrigation rights." (Ruling and Order at 29); Utah Code Ann. §§ 73-1-1 *et seq*. [7] The Legislature acted within its broad authority, striking a balance between the public ownership of waters and the private ownership of streambeds. Indeed, to prohibit the Legislature from taking action which regulates public property would have far reaching implications not only in the firmly rooted regulation of water, but also in the Legislature's ability to regulate all public lands.

USAC reads too literally the word "trust" and would have the State act as the virtual fiduciary of the recreating public, unable to exercise discretion with respect to the State's resources in a way that might limit recreation. This is at odds with the guiding legal doctrines and it is at odds with reality. "While the state's duties to the [trust beneficiaries] are important, they cannot and do not override every other obligation." *Nat'l Parks*, 869 P.2d at 923. The Legislature, as representative of the people of the state, is beholden not only to the recreationists, but to farmers needing water for irrigation, and for consumption. The State Engineer may permit appropriation of water to private appropriators for irrigation or mining to the point of drying up a stream; the State may put dams on rivers making reservoirs where none existed and dry creek

[7] *See also* Ruling and Order at 29 (citing Utah Division of Wildlife Resources, *Proclamation of the Wildlife Board for Taking Fish: 2012, Fishing Guidebook*, p. 20 (http://wildlife.utah.gov/dwr/fishing/guidebooks/673-2012-fishing-guidebook.html) (noting annual closure of some state waters to fishing)).

beds where waters were once plentiful. If the Legislature is required to assure that a person can stand and fish wherever water flows in the State, then none of this regulation is feasible.

Taken to its logical conclusion, USAC's version of the state public trust doctrine would render it impossible for the State to regulate its resources. The Legislature is in a difficult position. It is responsible not only to protect the interests of USAC, but to protect the interests of all of the public and to do so within the bounds of the Constitution. It is not free to bend to the will of any particular interest group at the expense of all others. Notwithstanding the difficulty in balancing all competing interests and all competing viewpoints to determine what is, in fact, best for the public, this Court has recognized: "As the branch of government responsible for policy-making, the Legislature is in the best position to weigh the competing interests in Utah's natural waters, and to regulate the scope of the public's use." (Ruling and Order at 31). The public may disagree. If they do, they can change the Legislature through election. A different legislature may strike a different balance. But, this Legislature has enacted H.B. 141 and has done so consistent with any applicable public trust principles.

V. CONCLUSION

Any state public trust doctrine requires a transfer, abrogation or abandonment of public property before the doctrine is even implicated. And any state public trust doctrine will tolerate a transfer or abandonment of public property so long as the public possesses an interest in the public property that remains. H.B. 141 did not transfer, abandon or abrogate the public's interest in its public property. Moreover, to the extent H.B. 141 regulates public property, this regulation does not prevent the public from retaining an interest in its public property. For these reasons, the legislature did not violate public trust principles with the passage of H.B. 141and summary judgment should be granted in ATC's favor and against USAC on this issue.

DATED this 26th day of October, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of October, 2012, I caused a true and correct copy of the foregoing document to be served via U.S. Mail to the following:

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